

No. 15627

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

TORRANCE NATIONAL BANK, a national banking association,

Appellant,

vs.

THE AETNA CASUALTY & SURETY COMPANY, a corporation,

Appellee.

PETITION FOR REHEARING.

JAMES A McLAUGHLIN,
650 South Spring Street,
Los Angeles 14, California,
Attorney for Appellant.

FILED

JAN 22 1938

PAUL P. O'BRIEN, CLERK

TOPICAL INDEX

PAGE

People v. Bendit has not been the law of the State of California since the amendment to Section 470 of the Penal Code in 1896	2
The court in the case of Pasadena Investment Co. v. Peerless Casualty Company, 132 Cal. App. 2d 328, did not even have before it a document which was signed or which purported to have been signed by an agent.....	3
The decision of this court is also contrary to public policy in that it exonerates surety companies who have sold forgery bonds and have collected premiums on the basis that these bonds afforded protection against forgery as defined by the existing statute and the recent decisions.....	5

TABLE OF AUTHORITIES CITED

CASES	PAGE
Burlingame v. Traeger, 101 Cal. App. 365.....	2
Keikhoefer v. U. S. Nat. Bank, 2 Cal. 2d 98.....	3
Monterey Club v. Superior Court, 48 Cal. App. 2d 131.....	3
Pasadena Investment Co. v. Peerless Casualty Company, 132 Cal. App. 2d 328.....	1, 3, 5
People v. Bendit, 111 Cal. 274.....	1, 2, 3, 4, 5
People v. Caldwell, 55 Cal. App. 2d 238.....	3
People v. McKenna, 11 Cal. 2d 327.....	3, 4
People v. McPherson, 6 Cal. App. 266.....	3
People v. Rushing, 130 Cal. 449.....	3
Sharon v. Sharon, 75 Cal. 1.....	3

STATUTE

Penal Code, Sec. 470	2, 4
----------------------------	------

TEXTBOOK

13 California Jurisprudence 2d, Sec. 143, pp. 674-676.....	4
--	---

No. 15627

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

TORRANCE NATIONAL BANK, a national banking association,

Appellant,

vs.

THE AETNA CASUALTY & SURETY COMPANY, a corporation,

Appellee.

PETITION FOR REHEARING.

To the Honorable Albert Lee Stephens, Chief Judge, the Honorable Dal M. Lemmon and the Honorable Stanley Nelson Barnes, Circuit Judges:

Appellant, above named, respectfully petitions this Court for a rehearing, after its decision on January 13, 1958, upon each of the following grounds:

1. The decision is predicated upon the premise that *People v. Bendit*, 111 Cal. 274, is still the law of California in spite of the subsequent amendment to the statute defining forgery. This conclusion is, in turn, based upon the erroneous assumption that the doctrine of *People v. Bendit*, *supra*, was reaffirmed as a matter of judicial decision in the case of *Pasadena Investment Co. v. Peerless Casualty Company*, 132 Cal. App. 2d 328. The state-

ment of the court in that case concerning *People v. Bendit* was pure dictum, because the court was not in that case concerned with the forgery by an agent.

2. The decision not only nullifies the express statutory definition of forgery, but it renders ineffective all forgery bonds carried by institutions to protect against loss arising out of forgeries by agents and employees of firms and concerns doing business with such institutions.

**People v. Bendit Has Not Been the Law of the State
of California Since the Amendment to Section 470
of the Penal Code in 1896.**

There is no question but what the statute (*Section 470* of the Penal Code) was materially changed by the legislature after the case of *People v. Bendit*. As the statute existed at the time *People v. Bendit* was decided, there was no reference to a signing without authority in the definition. (Appx. to App. Op. Br.)

Statutory law is entitled to an even higher dignity than law enunciated by court decisions. In *Burlingame v. Traeger*, 101 Cal. App. 365, the court states the rule at page 371:

“It must also be borne in mind that ‘our codes, of course, were intended as complete revisions of the existing laws upon the subjects embraced therein.’ (Estate of Carraghar, 181 Cal. 15 (183 Pac. 161, 163)), and that their provisions establish the law of this state respecting the subjects to which they relate. (*In re Apple*, 66 Cal. 432 (6 Pac. 7); *McLean v. Blue Point Gravel Min. Co.*, 51 Cal. 255.) It is only when the code and other statutes are silent that the common law governs.”

See also:

Monterey Club v. Superior Court, 48 Cal. App. 2d 131, at p. 145; and

Sharon v. Sharon, 75 Cal. 1, at p. 28.

On page 14 of Appellant's Opening Brief, we cited five California decisions which apply the rule that the signing without authority constitutes a forgery.*

The Court in the Case of Pasadena Investment Co. v. Peerless Casualty Company, 132 Cal. App. 2d 328, Did Not Even Have Before It a Document Which Was Signed or Which Purported to Have Been Signed by an Agent.

The quotation in the above case from *People v. Bendit* is nothing more than dictum. As was pointed out on page 22 of Appellant's Opening Brief, that case involved a sole proprietor doing business under a fictitious name who had written up fictitious invoices, and the question before the court was not whether this man was purporting to sign as agent for or in behalf of anyone else. The sole question was whether, in writing up fictitious invoices purporting to represent sales of merchandise, the proprietor had committed a forgery. The fact that the court in that case quoted language from *People v. Bendit*, part of which was pertinent and part of which was not, does not give dignity to the language in the quotation which was not necessary to the decision. In fact, it is clear that the court in *Pasadena Investment Co. v. Peerless Casualty Company*, *supra*, did not intend to formulate

**People v. Rushing*, 130 Cal. 449 at 451, *et seq.*; *Keikhoefer v. U. S. Nat. Bank*, 2 Cal. 2d 98 at 108; *People v. McKenna*, 11 Cal. 2d 327 at 332; *People v. Caldwell*, 55 Cal. App. 2d 238 at 245; and *People v. McPherson*, 6 Cal. App. 266 at 269.

a definition of forgery which was in any way contrary to *Section 470* of the Penal Code. This is evidenced by the fact that the court, after quoting from *People v. Bendit*, immediately quoted from *People v. McKenna*, 11 Cal. 2d 327, to the effect that a signing "without authority" with an intent to defraud was a forgery.

Even though the District Court of Appeal had intended to lay down the rule that signing the name of another without authority is not a forgery, it would have been only dictum and not law in any sense of the word at all. This rule is stated in 13 *Cal. Jur.* 2d, Courts, Section 143, at pages 674 to 676, as follows:

"The doctrine of *stare decisis* applies only to points that are involved and determined in a case in such a way as to be considered of compelling force as precedents in subsequent cases. A statement in a judicial opinion as to any other matter may be avoided or rejected in a subsequent case under the title of 'dictum', 'obiter dictum', 'mere dictum,' and the like, or it may nevertheless be adopted and followed, although the court by terming it dictum indicates that it does not feel compelled by *stare decisis* to follow it. Thus, 'dictum' described so many different types of statements of law that it can truthfully be said to describe nothing more precise than a judicial attitude or policy in the law of precedents, and frequently conceals more than it reveals.

"A statement of law may be labeled dictum for a variety of reasons. The traditional instance is where it is not regarded as germane or necessary to a determination of the issues before the court. Similarly, a legal proposition that is stated in broader terms than is called for by the facts to which it is applied has little value as precedent when invoked in a different factual situation."

The opinion in the case of *Pasadena Investment Co. v. Peerless Casualty Co.*, *supra*, is clear as to the precise issues involved. No briefs were written in that case involving the question which is before this court in the present case. Neither was any petition for hearing filed with the Supreme Court of the State of California involving any question such as the one involved in this case. For this reason, the case cannot be used to resuscitate the dead law in the decision of *People v. Bendit*, *supra*. The cases which state the presently applicable law have already been cited under our footnote herein and in Appellant's Opening Brief.

The Decision of This Court Is Also Contrary to Public Policy in That It Exonerates Surety Companies Who Have Sold Forgery Bonds and Have Collected Premiums on the Basis That These Bonds Afforded Protection Against Forgery as Defined by the Existing Statute and the Recent Decisions.

By a process of quoting too extensively from the case of *People v. Bendit*, a dictum arose which revitalized the doctrine of *People v. Bendit* and nullified the statute and the more recent decisions. The decision of this court, by following the dictum in the *Pasadena Investment Co. v. Peerless Casualty Co.* case, has transformed such dictum into law, with the result that institutions having bonds similar to the one involved in this action have no protection against forgery except in instances where the forger signs the name of another person and also falsely impersonates such other person. Both of these elements will be necessary if the decision of this court is to become the law. Aside from exonerating surety companies on liability for forgeries which have already occurred, the

decision of this court will require the rewriting of all forgery bonds in this state so as to embody language covering the signing as agent of another without authority. It cannot be assumed that holders of the present type of bonds will continue to pay premiums merely to obtain coverage in instances where the forger falsely impersonates the person whose name he has forged.

Modern business and financial institutions operate through officers and employees, and it is the unauthorized signing of documents by such officers and employees against which it is necessary to insure. The instances where an individual can come in and represent himself as being the party whose name he has forged are not only infrequent, but they involve small sums of money. They are usually small checks cashed in grocery and department stores. The substantial losses arise from forgeries committed by officers and employees, as in the case at bar, and these are the type of losses against which forgery bonds are purchased.

For each of the reasons above stated, it is respectfully submitted that a rehearing should be granted and that the decision of the District Court should be reversed.

Respectfully submitted,

JAMES A. McLAUGHLIN,

Attorney for Appellant.

Certificate of Counsel.

I, James A. McLaughlin, counsel for Petitioner in the above entitled action, hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for delay, and in my opinion is well founded in law and in fact, and proper to be filed herein.

JAMES A. McLAUGHLIN,
Attorney for Petitioner.

